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No. 06-709

In the
Supreme Court of the United States

DARRELL GRAYSON,
Petitioner,

v.

TROY KING, Attorney General for the State of Alabama, in his official capacity; ROBERT E. OWENS, JR., District Attorney for Shelby County, in his official capacity; SHELBY COUNTY DISTRICT ATTORNEY'S OFFICE,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED
(Restated)

Is there a federal constitutional right to post-conviction DNA testing in the circumstances presented, namely, where (1) the petitioning inmate has never affirmatively asserted his actual innocence; (2) the record evidence of his guilt is overwhelming; (3) the testing sought cannot conclusively prove his innocence; and (4) he waited, without explanation, until the eleventh hour to seek testing?

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STATEMENT OF THE CASE

A. Facts of the Crime

Petitioner Darrell Grayson was charged with, convicted of, and sentenced to death for the brutal burglary-murder of 86-year-old widow Annie Laura Orr. The Eleventh Circuit recounted the facts of the crime as follows:

> During the evening hours of December 23rd, 1980, the Defendant Darrell Grayson, Co-defendant Victor Kennedy, and two other individuals, met at Kennedy's residence, also in Montevallo, and a short distance from that of Mrs. Orr. They drank wine and played cards. Sometime shortly after midnight, and after the other individuals had gone, Kennedy and Grayson left Kennedy's house on foot, walking in the direction of Mrs. Orr's house. They were armed with a .38 Caliber handgun, which belonged to Kennedy. They decided to burglarize Mrs. Orr's residence in order to get some money. They had previously discussed such a burglary, that Mrs. Orr was elderly, and where she kept her money.
>
> They entered the Orr house during the very early morning hours of December 24th, 1980, through a rear basement door. They then proceeded through the dirt basement, up several steps, and into the main living portion of the house near Mrs. Orr's bedroom. The Defendants used a flashlight to illuminate their way.
>
> Once inside the living portion of the house they entered Mrs. Orr's bedroom where she was apparently sleeping. They subdued and beat her, striking her in the head with a blunt instrument and breaking several of her ribs. Darrell Grayson then placed a pillowcase over her head and

> wrapped two relatively long lengths of masking tape very tightly around her head so that when they were finished he[r] head then appeared to be that of a mummy. They then proceeded to look for money and other valuables.
>
> When apparently they could not find a significant amount of cash, the[y] began threatening Mrs. Orr by beating her further, threatening to drown her, and firing two shots from Kennedy's pistol, into her bedroom block and wall. Also during their assault, they raped Mrs. Orr repeatedly. Darrell Grayson said he didn't want to rape Mrs. Orr but that he did so twice. Mrs. Orr lived through the assault of being raped, beaten, threatened, unable to see or adequately breathe, and begging her assailants not to hurt her but to take the money and leave, for a considerable period of time. She then died.

Grayson v. Thompson, 257 F.3d 1194, 1197-98 (11th Cir. 2001).

On the morning of December 24, 1980, Mrs. Orr's son discovered her dead body in her home in Montevallo, Alabama, and called law enforcement officers. *Id.* at 1198. The officers discovered a trail of playing cards leading from Mrs. Orr's home to the home of Victor Kennedy, a known burglar. *Id.* Knowing that Kennedy and Grayson had been seen together the previous night, officers began looking for Grayson on the afternoon of December 24, 1980, and discovered him "squatting in the bushes" in a wooded area near his home. *Id.* Following his arrest, Grayson confessed. *Id.* Officers also discovered Mrs. Orr's wedding rings in Grayson's wallet and obtained physical evidence from Grayson that linked Grayson to the crime. *Id.* Grayson was taken into custody. *Id.*

App. 2a-4a.

In short, Grayson "burglarized, beat, terrorized, raped, and suffocated to death a helpless 86-year-old lady." *Grayson v. State*, 479 So. 2d 69, 75 (Ala. Crim. App. 1984). The state court vividly described the crime as "more characteristic of the actions of wild ravaging dogs of hell rather than even the lowest and most depraved level of humanity." *Id.* at 75-76.

B. Criminal and Post-Conviction Proceedings

Grayson was charged with Mrs. Orr's murder, which was made capital pursuant to Ala. Code §13A-5-31(a)(4) (1975)[1] because it was committed during a burglary (the predicate for which was the intent to rob Mrs. Orr). *See* C.A. ER 24, App. A (indictment). "Grayson was not indicted for rape [or] capital rape-murder." App. 9a.

The evidence of Grayson's guilt presented at trial (described in greater detail below, *see infra* at 13-16) was, as the Eleventh Circuit reiterated, "overwhelming." App. 18a, 24a. In addition to the biological evidence that Grayson now assails (Pet. at 5-6), the trial evidence included the following: (1) Grayson's numerous statements in which he repeatedly confessed to the murder; (2) Grayson's own trial testimony, in which, while asserting that he was too drunk to recall some of the details, he again "admitted to the burglary, rape, and murder," App. 8a; and (3) physical evidence in the form of (a) Mrs. Orr's wedding rings, which police found in Grayson's wallet, *see id.*, (b) a shirt that police found hidden under a rock near Grayson's home and that "had spattered human blood on it, of a type consistent with that of the victim, Mrs. Orr," C.A. ER App. B, p.200 (sentencing order), and (c) a hair in Grayson's sock that, while not conclusive, was "consistent with the victim's head hair and inconsistent with Grayson's," App. 6a.

The jury convicted Grayson and then recommended that

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[1] Currently Ala. Code §13A-5-40(a)(4).

he be sentenced to death. App. 9a. After a separate sentencing hearing, the judge accepted the jury's recommendation and sentenced Grayson to death. *Id.* Grayson's conviction and sentence were affirmed on direct appeal, and this Court denied certiorari. *See Grayson v. State*, 479 So. 2d 69 (Ala. Crim. App. 1984), *aff'd, Ex parte Grayson*, 479 So. 2d 76 (Ala.), *cert. denied, Grayson v. Alabama*, 474 U.S. 865 (1985).

Grayson filed a petition for post-conviction relief in state court in January 1986. Thereafter, in September 1990, Grayson filed an amended state post-conviction petition. Grayson subsequently amended that petition three times – in August 1991, in January 1992, and again in March 1992. *Grayson*, 257 F.3d at 1208. In his state post-conviction petitions, Grayson presented a laundry list of claims (47, by our count) alleging all manner things – that his counsel were ineffective, that his confessions were involuntary, that there was insufficient evidence, that he was denied expert mental-health assistance, etc. After conducting a two-day hearing, the trial court denied relief; the Alabama Court of Criminal Appeals affirmed, and this Court again denied certiorari. *Grayson v. State*, 675 So. 2d 516, 519-31 (Ala. Crim. App. 1995), *cert. denied*, 519 U.S. 934 (1996). *Not once during the nearly 10 years that his state post-conviction proceedings were pending did Grayson seek DNA testing of any biological evidence.*

In April 1996, Grayson filed a federal habeas petition. In it, he raised some 46 claims – among them, that his lawyers were ineffective, that his confessions were involuntary, and that he was denied funds to hire a forensic pathologist. The district court denied relief, the Eleventh Circuit affirmed, *Grayson*, 257 F.3d at 1215-32, and this Court once again denied certiorari, 536 U.S. 964 (2002). *Not once during the 5-plus years that his federal habeas proceedings were pending did Grayson seek DNA testing of any biological evidence.*

C. Section 1983 and Related Proceedings

1. ***Prelude to the Eleventh Circuit.*** On August 12, 2002, after state and federal post-conviction proceedings had run their course, the State moved the Alabama Supreme Court to set an execution date. Presumably in response to the State's

motion - and for the first time in any court - Grayson on September 23, 2002 filed in state court a request to subject certain items of physical evidence to DNA testing. After the state court denied his motion, Grayson went to federal court, and on November 15, 2002 filed the present §1983 action seeking an order requiring DNA testing. ER 1 (complaint). Only then, on March 27, 2003, did Grayson lodge an "opposition" to the State's motion to set an execution date - asserting as the basis for his opposition the existence of his DNA-based §1983 action in federal court. In his opposition, Grayson effectively asked the Alabama Supreme Court to stay his execution pending final resolution of this §1983 suit. *See* Opposition to State's Motion To Set Execution Date at 2, *Ex parte Grayson*, No. 1830756 (Mar. 27, 2003) ("Mr. Grayson respectfully requests that this Court withhold a ruling on the State's motion until the disposition of pending litigation.").

The State responded that if Grayson thought that his §1983 action in federal court necessitated a stay, "he [could] seek such relief from that court." State's Response to Grayson's Opposition at 10, *Ex parte Grayson*, No. 1830756 (Apr. 30, 2003). But to no avail. Over three dissents, the Alabama Supreme Court denied the State's motion to set an execution date - effectively staying Grayson's execution - "pending a ruling on the motion for DNA testing ...." Order, *Ex parte Grayson*, No. 1830756 (May 22, 2003).[2]

Back in federal court, the magistrate judge on June 16, 2003 filed a report recommending that Grayson's §1983 suit for DNA testing be dismissed for failure to state a claim. He noted that while "[i]n appropriate circumstances" a condemned inmate might be able to make out a §1983 claim for post-conviction DNA testing (App. 45a), Grayson himself could not, particularly given that he had "testified under oath in open court that he committed" the murder (App.

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[2] This context sheds important light on Grayson's assertion that this litigation has proceeded "deliberately" because "[t]he State has yet to set an execution date ...." Pet. at 22.

41a). In an opinion filed September 15, 2005, the district court adopted the magistrate judge's recommendation and dismissed Grayson's complaint. The district court emphasized that Grayson, "given repeated opportunities to do so, ha[d] not cited any legal authority that he has a constitutional right to DNA evidence when that evidence would not prove his innocence." App. 32a. The court found that Grayson's "argument that the DNA testing would exonerate him [was] flawed because at best it could only prove that he did not rape the victim - not that he did not kill her as charged," *i.e.*, during the commission of a burglary. *Id.*

2. ***The Eleventh Circuit's decision.*** The Eleventh Circuit unanimously affirmed. After reiterating circuit precedent that "claims seeking post-conviction access to biological evidence for DNA testing purposes may be brought as a §1983 action" rather than a habeas petition (App. 14a),[3] the Eleventh Circuit turned to address Grayson's contention that there is a federal constitutional right to post-conviction DNA testing under either *Brady v. Maryland*, 373 U.S. 83 (1963), or *Matthews v. Eldridge*, 424 U.S. 319 (1976).

The Eleventh Circuit first rejected Grayson's *Brady* argument. Citing numerous decisions of this Court for support, the court of appeals observed that "[t]he *Brady* rule is grounded in a defendant's right to a fair trial." App. 15a. Quoting *United States v. Bagley*, 473 U.S. 667, 675-76 (1985), the Eleventh Circuit reiterated that "'unless the omission [*i.e.*, the alleged failure to disclose] deprived the defendant

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[3] The State has in the past disputed the cognizability of DNA-testing requests under §1983 as a general matter, *see* Pet. for Certiorari, *Pryor v. Bradley*, No. 02-1237, *cert. denied*, 538 U.S. 999 (2003), and challenged in this case the cognizability of Grayson's specific testing request, which is predicated on an assertion that the State's serology expert offered false testimony at trial, *see* State C.A. Br. 52-57. (As to the substance of the charge, see the Eleventh Circuit's explanation, App. 7a n.2.) The point is that, to the extent that Grayson's testing request rests on an underlying allegation that the State's serologist testified "false[ly]" or "fraudulent[ly]" (Pet. at 4, 6), it "necessarily impl[ies] the invalidity of" his conviction and thus triggers the bar of *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

of a fair trial, there was no constitutional violation requiring that the verdict be set aside.'" App. 15a (also citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), and *United States v. Agurs*, 427 U.S. 97, 108 (1976), as requiring denial of a "fair trial" as a predicate to a *Brady* claim). Because *Brady* doctrine concerns "the suppression of evidence prior to and during trial that was material to the proceedings and denied the defendant a fair trial," because Grayson "makes no argument that the biological evidence was suppressed at trial," and because "it is beyond peradventure that Grayson received a fair trial," the *Brady* line of cases, the Eleventh Circuit concluded, is simply irrelevant. App. 16a.

Continuing, the Eleventh Circuit held that neither *Imbler v. Pachtman*, 424 U.S. 409 (1976), nor *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), supports extending *Brady*'s disclosure rule beyond a defendant's trial and conviction. The former, by its own terms, speaks only of a prosecutor's "ethical obligations," not his §1983-enforceable constitutional obligations (App. 16a), and the latter "pertained to a request for files during [an] ongoing prosecution" (App. 16a-17a). Put simply, the Eleventh Circuit determined that there is no support in this Court's precedent "for the proposition that *Brady*'s constitutional rule – *i.e.*, the state's disclosure obligation – extends beyond a defendant's conviction." App. 16a.

Finally with respect to *Brady*, the Eleventh Circuit emphasized that the only other federal appellate courts to address a claim like Grayson's – *i.e.*, that there is a due process right to post-conviction DNA testing – have rejected it. Specifically, the Eleventh Circuit pointed to *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), and *Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006) (unpublished), in which the Fourth and Sixth Circuits, respectively, rejected the contention that *Brady*'s disclosure obligation extends beyond a defendant's trial so as to support a claim for post-conviction DNA testing. App. 18a-19a & n.7.

Having dispensed with Grayson's *Brady* argument, the Eleventh Circuit addressed *Matthews*' three-part balancing test. Noting the division among the members of this Court

in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the court below questioned whether a *Matthews*-style analysis was even appropriate to someone, like Grayson, who has been duly convicted and sentenced to death. App. 23a-24a. For purposes of analysis, however, the court "assum[ed] *arguendo* that Grayson ha[d] some residual, continuing liberty interest under the due process clause and that the *Matthews* test applies to deprivation of that interest." App. 24a. Even granting that assumption, the Eleventh Circuit held that "the second and third *Matthews* factors overwhelm [Grayson's] alleged private interest." *Id.*

The court concluded that the second factor – the risk of erroneous deprivation and the utility of additional process – "weigh[ed] heavily against Grayson's claim" for two reasons: first, because Grayson's "interest in his life was already litigated extensively for twenty years," *i.e.*, through trial, direct appeal, and state and federal post-conviction proceedings; and second, because the DNA testing sought by Grayson (of semen stains on Mrs. Orr's nightgown and bed sheet, *see* Pet. at 12) pertains only to the question whether Grayson raped Mrs. Orr, "and could not exculpate Grayson of the capital murder during a burglary – the only crime of conviction," for which the uncontested evidence of Grayson's guilt "was and is overwhelming." *Id.* "Accordingly," the Eleventh Circuit held, "the risk of an erroneous deprivation of Grayson's alleged liberty interest is low, and the probable value of Grayson's post-conviction access to the evidence is slight." App. 25a.

As to the third factor – the gravity of the State's interest – the Eleventh Circuit, citing decisions of this Court for support, found that "the government has a strong interest in the finality of duly adjudicated criminal judgments." *Id.* (citing *Calderon v. Thompson*, 523 U.S. 538, 555 (1998), *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992), and *Murray v. Carrier*, 477 U.S. 478, 487 (1986)). Particularly given that Grayson "enjoyed extensive judicial process over the years since his conviction," the court concluded that the interests in "guarding against a flood of requests, protecting the finality of convic-

tions, and ensuring closure for victims and survivors" counseled against Grayson's eleventh-hour testing request. *Id.*

In closing, the Eleventh Circuit noted that it did not need to "decide whether there can *ever* be a post-conviction right of access to the type of biological evidence Grayson seeks for DNA testing." App. 26a. Instead, the court "simply conclude[d] that under the particular circumstances of this case, Grayson cannot show such an entitlement." *Id.*

REASONS FOR DENYING THE WRIT

I. This Court Should Deny Certiorari Because There Is No Conflict In The Circuits.

The chief reason for granting certiorari, of course, is to resolve a conflict among the United States courts of appeals or state courts of last resort. *See* Sup. Ct. R. 10(a)-(b). Here, there is no such conflict. Tellingly, the most Grayson can bring himself to say is that "[v]arious federal and state courts have spoken on the question presented by this petition" and (opaquely) that "jurists are looking to this Court to settle the question." Pet. at 21. To the extent that Grayson means to suggest that there is a genuine conflict that warrants this Court's attention, he is simply wrong. In fact, every appellate court that has squarely considered the question has rejected the very arguments that Grayson makes here and has held that there is no federal constitutional right to post-conviction DNA testing.

In *Harvey v. Horan*, a convicted rapist sought "a constitutional right of access to DNA evidence under 42 U.S.C. §1983." 278 F.3d 370, 372 (4th Cir. 2002). In an opinion authored by then-Chief Judge Wilkinson, the Fourth Circuit refused the claim and declined to "fashion a substantive right to post-conviction DNA testing out of whole cloth or the vague contours of the Due Process Clause." *Id.* at 375. Particularly relevant for present purposes, the Fourth Circuit expressly rejected the two arguments that Grayson featured below and reiterates in his petition here – namely, that a substantive right to post-conviction DNA testing arises un-

der either (1) *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, *see* 278 F.3d at 378-79; or (2) the *Matthews v. Eldridge*, 424 U.S. 319, three-part balancing test, *see* 278 F.3d at 377. (The Fourth Circuit likewise rejected the rapist-plaintiff's reliance on *Arizona v. Youngblood*, 488 U.S. 51 (1988). *See* 278 F.3d at 380 n.3; *see also id.* at 386-87 (King, J., concurring). Grayson invoked *Youngblood* in the Eleventh Circuit, *see* App. 17a-18a n.6, but seems to have abandoned it here, *see* Pet. at vi-vii (Table of Authorities).) In deciding the case as it did, the Fourth Circuit expressed specific concern that "[e]stablishing a constitutional due process right under §1983 to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state." 278 F.3d at 376. Further, observing that "[t]his is not an area in which legislatures have been inactive," the Fourth Circuit worried that by minting a new constitutional right it would "improperly short-circuit legislative activity by allowing judges, rather than legislatures, to determine the contours of the right." *Id.*

More recently, the Sixth Circuit, in an unpublished opinion authored by Chief Judge Boggs, agreed that (at least in the circumstances presented) "there exists no general constitutional right to post-conviction DNA testing." *Alley v. Key*, No. 06-5552, 2006 WL 1313364, at *1 (6th Cir. May 14, 2006). The Sixth Circuit's decision is particularly relevant here for three reasons. First, the circumstances in which Alley's case arose are essentially identical to those surrounding Grayson's: (1) "Alley confessed to most features of the brutal attack" for which he was convicted and sentenced to death; (2) "[h]e never asserted his innocence either at trial or until very lately in the nineteen years since his conviction"; and (3) he filed his DNA-testing request "as part of a last-minute claim of actual innocence." *Id.* Second, the Sixth Circuit rejected the very arguments that Grayson presses here: (1) there is "no procedural due process right to post-conviction DNA testing"; (2) there is "no substantive due process right" to such testing; (3) "[n]or does *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), demand" testing. *Alley*, 2006 WL

1313364, at *2. And finally, it is pertinent for present purposes because this Court denied certiorari. *See Alley v. Key*, 126 S. Ct. 2973 (2006).

The Eleventh Circuit's decision here is perfectly consistent with - and, as noted above, expressly cites for support - the Fourth and Sixth Circuit's decisions. With respect to the Fourth Circuit's decision in Harvey, the court below observed: "The only circuit court to address this issue in a published opinion is the Fourth Circuit in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002). In that case, the Fourth Circuit rejected plaintiff Harvey's due process claim for post-conviction access to biological evidence against him for DNA testing. *Id.* at 376-77." App. 18a-19a (footnote omitted). As to the Sixth Circuit's decision in *Alley*:

> In an unpublished opinion, the Sixth Circuit affirmed the district court's ruling in *Alley v. Key*, 431 F.Supp.2d 790 (W.D. Tenn. 2006), that the petitioner, a death-row inmate, had no post-conviction constitutional right to biological evidence used against him at trial for purposes of DNA testing, and affirmed the resulting dismissal of the petitioner's §1983 complaint. *Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006) (unpublished), *cert. denied*, 126 S. Ct. 2973 (2006). The Sixth Circuit noted that "there exists no general constitutional right to post-judgment DNA testing," and specifically rejected essentially the same due process and *Brady* claims asserted by Grayson here. *Id.* at *1-2.

App. 18a-19a n.7.

There is, therefore, no circuit split that requires this Court's attention. To the contrary, the circuits are lining up behind the position embraced by the Eleventh Circuit here. In the light of the current unanimity in the circuits, Grayson's report that as of the filing of his petition, "at least six other cases that raise virtually the same question were percolating in the lower federal courts" works against him. Pet. at 21 (citing cases pending in the Second, Seventh, and Ninth

Circuits, as well as in district courts in Massachusetts and Alabama). This Court should allow the DNA-testing issue to "percolat[e]." If, by chance, the First, Second, Seventh, or Ninth Circuit were to go on record disagreeing with the currently prevailing view embraced by the Fourth, Sixth, and Eleventh Circuits, then - but only then - would this Court have a genuine conflict to address. Until that time, there simply is no exigency requiring this Court's review.

II. This Court Should Deny Certiorari Because The Eleventh Circuit's Decision Is Correct.

In his petition, Grayson asserts that the Eleventh Circuit's decision was "wrong and contrary to this Court's precedents." Pet. at 20. He is incorrect. Particularly given the specific circumstances of Grayson's case, the Eleventh Circuit's decision here was plainly the right one.

A. The Peculiar Circumstances Of Grayson's Case Make His Claim To Post-Conviction DNA Testing Particularly Weak.

This case arises, of course, against a particular backdrop. Before explaining the substantive failure of Grayson's arguments, it is worth emphasizing several considerations that underscore the hollowness of Grayson's case.

1. *Grayson has never affirmatively asserted his innocence.* This is a unique case. Grayson warns in his petition that without the creation of a new federal constitutional right to post-conviction DNA testing, "a significant risk exists that an innocent man will be executed." Pet. at 11. And yet, Grayson has *never* - not at trial, not on appeal, not during state post-conviction proceedings, not on federal habeas - affirmatively asserted that he is, in fact, innocent of Mrs. Orr's murder. Indeed, even in the current round of §1983 litigation, all Grayson (having filed a fresh affidavit) can bring himself to say is that he was drunk the night of the murder, that he now "ha[s] no recollection of the crime," and that he "would like to know the truth" concerning his guilt. C.A. ER 1 Exh. F, pp.1-2. Thus, as the Eleventh Circuit emphasized, "[n]owhere" has Grayson ever "claim[ed] ac-

tual innocence." App. 12a; *see also id.* at 18a ("Even now, Grayson does not contend that he is actually innocent ...."); *id.* at 20a ("Grayson also still does not contend that he is actually innocent ...."); *id.* at 26a ("Grayson has never affirmatively proclaimed his actual, factual innocence ....").

The absence of any affirmative assertion of actual innocence here starkly distinguishes Grayson's case from those on which he principally relies. The petitioner in *Harvey v. Horan* - which, again, rejected the very claim Grayson makes here - unambiguously "claim[ed] that he [was] innocent." 278 F.3d at 375. And, indeed, even former Judge Luttig, on whose solo opinion Grayson so heavily relies,[4] would apparently have restricted any due process DNA-testing right to those who have "steadfastly maintain[ed]" and "persist[ed] in" their "absolute," "factual" innocence. *Harvey v. Horan*, 285 F.3d 298, 318, 319 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc). The inmate in *Godschalk v. Montgomery County District Attorney*, 177 F. Supp. 2d 366 (E.D. Pa. 2001),[5] likewise had consistently "maintained ... his innocence," Innocence Project, Case Profiles: Bruce Godschalk, http://www.innocenceproject.org/case/display_profile.php?id=102 (Nov. 28, 2006). So, too, the petitioner in *Wade v. Brady*, No. 04-12135-NG, 2006 WL 3051770 (D. Mass. Oct. 27, 2006),[6] "told authorities, and has maintained to this day, that he did not" commit the rape of which he was convicted. *Id.* at *3.

The point is simply that inasmuch as Grayson has *never* affirmatively asserted his actual, factual innocence of Mrs. Orr's murder, his request for DNA testing is doubly novel.

2. ***The evidence against Grayson is overwhelming.*** It is common ground here (as stated by Grayson lawyer and Innocence Project Executive Director Nina Morrison) that the

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[4] *See* Pet. at 2, 20, 23, 25, 26.

[5] *See* Pet. at 9, 13, 23, 25-26.

[6] *See* Pet. at 20, 23, 24-25.

record evidence of Grayson's guilt is "overwhelming." C.A. ER 1, p.13; *accord* App. 18a, 24a ("overwhelming").

At trial, the State presented abundant evidence (contested biological evidence aside) to support a conviction for capital burglary-murder. *See* App. 4a-9a (summarizing evidence). A brief tour is in order. First, shortly after his arrest, Grayson admitted that he and his accomplice, Kennedy, "had been planning for a couple of weeks to rob Mrs. Orr to get money for Christmas" and that Mrs. Orr "was selected as a target because [Grayson] had worked for her and was familiar with her house and where she kept money." *Grayson*, 257 F.3d at 1199. Second, "officers recovered Mrs. Orr's wedding rings from Grayson's wallet ...." *Id.* at 1198. Third, "hidden under a rock near [Grayson's] residence," investigators discovered a bloody shirt belonging to Grayson that "had spattered human blood on it, of a type consistent with that of the victim, Mrs. Orr." C.A. ER 24 App. B, p.200 (sentencing order); *see also Grayson*, 257 F.3d at 1201. Fourth, investigators discovered a hair in Grayson's sock that was "consistent with [Mrs. Orr's] head hair." *Id.* at 1202; *see also* C.A. ER 24 App. B, p.201.

In addition, there were Grayson's numerous confessions concerning his role in the burglary-murder. *See* App. 4a-5a (recounting confessions). In his first statement (taken after two rounds of *Miranda* warnings and a written waiver), Grayson admitted that

> he had performed yard work for Mrs. Orr in the past, was familiar with her house, and had entered her home with Victor Kennedy in the early morning hours of December 24. He admitted that they had awakened Mrs. Orr and had repeatedly raped her in the course of searching the house for valuables. After taking what money and valuables they could find, Grayson and Kennedy left Mrs. Orr on her bed and left the house.

Grayson, 257 F.3d at 1199. Shortly thereafter, Grayson waived his *Miranda* rights a third time and gave another

statement in which he confirmed the details of the earlier confession but "claimed that both the burglary and the rape were Kennedy's ideas." *Id.*

Two days later, after again being advised of and waiving his *Miranda* rights, Grayson confessed a third time:

> Grayson explained that he and Kennedy had been planning for a couple of weeks to rob Mrs. Orr to get money for Christmas. Grayson said that Mrs. Orr was selected as a target because he had worked for her and was familiar with her house and where she kept money. * * * Grayson stated that Mrs. Orr had begged them not to hurt her and told them to take her money. Grayson explained that he had taped a pillowcase over Mrs. Orr's face to prevent her from recognizing him, although he stated that he did not think Mrs. Orr would recognize him since it had been years since he had worked for her. After he taped the pillow case over her head, Grayson could not understand what she was saying and that her words sounded like mumbling. He described both Kennedy and himself raping Mrs. Orr repeatedly and their unsuccessful search for money and other valuables.

Id. at 1199-1200. The state and federal courts have uniformly found that Grayson's confessions were entirely voluntary. *Id.* at 1201, 1214, 1230. What is more, as the Eleventh Circuit observed on habeas, "[d]uring the past twenty years, Grayson has never recanted his confessions." *Id.* at 1201.

Grayson also testified at trial. *See* App. 8a-9a (reviewing trial testimony). And although he sought to fine-tune his story a bit (*e.g.*, by claiming that he was too drunk to recall some of the particulars), he clearly reiterated at trial a number of details concerning his participation in the burglary-murder. Among them: (1) "Grayson admitted that he and Kennedy had been planning a robbery for at least a week and that Mrs. Orr's house was chosen because Grayson had worked for her and knew her house and where she had kept

money"; (2) "Grayson also admitted that he had wrapped a pillowcase and tape around Mrs. Orr's head" so as to "keep from being identified"; and (3) Grayson "explained that he hid the bloodstained shirt he had been wearing the night [of the murder] in the woods after recalling his involvement in the crime." *Grayson*, 257 F.3d at 1203-04. Indeed, Grayson made no effort whatsoever at trial to deny his involvement in the burglary-murder; rather, "[b]ecause Grayson had confessed to his involvement in Mrs. Orr's death," his lawyer was left to try to mitigate Grayson's intent by emphasizing his intoxication. *Id.* at 1205.

A brief word about Grayson's confessions: Grayson's petition asserts, without any support at all, that "there is substantial reason to doubt Mr. Grayson's confessions." Pet. at 17. With respect, that is just not so. The social-science sources Grayson cited in the court below emphasize the risks resulting from coercive police practices - he referred there to "interrogation-induced" and "police-induced" confessions, "poor police practice [and] overzealousness," etc. Grayson C.A. Br. 44-45. Those concerns are inapposite here; again, every court to have considered the issue has found that the police questioning of Grayson was proper and that Grayson's confessions were voluntary. What is more, Grayson "testified under oath in open court" that he participated in Mrs. Orr's murder. App. 41a (report and recommendation). Grayson has suggested that not even his in-court confession should count, because it might have been just an "internalized" recitation of his earlier confessions. Grayson C.A. Br. 43-46. But even setting aside the fact that there is no reason on this record to doubt Grayson's custodial confessions, Grayson did *not* just mechanistically regurgitate the same old story at trial. Instead, he fine-tuned his story on the stand, denying that he was able to remember some of the details to which he had earlier confessed. What didn't change, however, was Grayson's core admission that he had actively participated in Mrs. Orr's murder. And it is that confession of guilt that, to this day, "Grayson has never recanted." *Grayson*, 257 F.3d at 1201.

3. ***DNA testing could not, even if favorable, conclusively prove Grayson's innocence.*** Grayson repeatedly asserts in his petition that DNA testing could "conclusively prove" that he "is innocent of the crime for which he has been sentenced to die." Pet. at 12; *see also, e.g., id.* at 13 (testing could "conclusively prove" that Grayson "was not involved in the crime"); *id.* at 26 (testing "can prove whether he is innocent or guilty of the crime for which he was convicted"). That is just not true, for two reasons.

First, it is important to recognize (as the Eleventh Circuit did, *see* App. 9a) that Grayson was convicted and sentenced not for *rape*-murder but, instead, for *burglary*-murder – with robbery, not rape, serving as the predicate for the burglary. *See Grayson v. State*, 479 So. 2d 69, 71 (Ala. Crim. App. 1984) ("Darrell Grayson ... was indicted for the capital offense involving the nighttime burglary and intentional killing of Annie Laura Orr. Alabama Code Section 13A-5-31(a)(4) (1975). Both counts of the indictment charged Grayson with breaking and entering with the intent to commit robbery and intentional killing. A jury found Grayson 'guilty of the capital offense as charged in Count One and Two of the indictment.'"). The specific basis of Grayson's capital-murder conviction matters, of course, because he now seeks DNA testing – of semen stains on Mrs. Orr's nightgown and bed sheet (Pet. at 12) – to prove, in essence, that he is innocent of a crime (rape-murder) for which he was neither charged nor convicted. Accordingly, as the district court quite correctly observed, Grayson's argument "that the DNA testing would exonerate him is flawed because at best it could only prove that he did not rape the victim – not that he did not kill her as charged," *i.e.*, during the commission of a burglary. App. 32a.

Presumably recognizing that even a favorable test could not impugn his formal charge, conviction, or sentence itself, Grayson offers a second argument: that a favorable test might call into question the "theory" or "narrative" of the offense that the State offered at trial. Pet. at 12, 13, 14, 15. But even this fallback position misses the mark. To be sure,

it was the State's position at trial that the two men who had perpetrated the burglary-murder for which Grayson was indicted, tried, convicted, and sentenced had also raped her. But that is not an inescapable scientific fact. At most, a DNA test favorable to Grayson here would suggest that the State's theory of how the burglary-murder unfolded was off-base – that perhaps, for instance, as the Eleventh Circuit recognized, "a third man was involved and had raped Mrs. Orr." App. 20a. A favorable test "would not exclude Grayson's involvement in the capital murder, much less definitively show his innocence." *Id.*

Critiquing the State's trial theory and conclusively proving actual innocence, of course, are two entirely different things. Grayson seems to assume that it is sufficient, even at this late stage – *i.e.*, post-trial, post-appeal, post-post-conviction – that "it is possible to imagine a number of alternative theories of the crime against Mrs. Orr," one of which *might* leave him out of the mix. Pet. at 13. The Eleventh Circuit, Grayson says, "erred when it accepted the State's inculpatory alternative theory of the crime to the exclusion of [his own] exculpatory alternative theory of the crime." *Id.* He is wrong about that. If the notion of finality has any bite at all, it must be the case that Grayson cannot *now* – 26 years and at least 9 court reviews after the fact – win relief simply by attempting to poke holes in the prosecutor's narrative of the case and by theorizing a scenario in which he didn't kill Mrs. Orr. And, indeed, this Court's decisions in *Herrera v. Collins*, 506 U.S. 390 (1993), *Schlup v. Delo*, 513 U.S. 298 (1995), and *House v. Bell*, 126 S. Ct. 2064 (2006), establish that the threshold for making out a freestanding "actual innocence" claim – which is the only lens through which Grayson's current suit can be understood[7] – is "extraordinarily

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[7] Grayson's DNA-based contention here cannot be understood as a prelude to a *Schlup/House*-like "gateway" claim for the simple reason that *there is nothing to which the "gateway" might lead.* There is no next step; this is the end of the road. Throughout the appellate and post-conviction processes, Grayson has presented claims assailing his trial as unfair. But those chal-

high." *Herrera*, 506 U.S. at 417. It is not enough for a convict in Grayson's shoes even to "cast considerable doubt on his guilt." *House*, 126 S. Ct. at 2087. Rather, he must make a "'truly persuasive demonstration'" of his actual, factual innocence. *Id.* at 2086 (quoting *Herrera*, 506 U.S. at 417).[8] He must, in short, actually prove his innocence, which is precisely what Grayson cannot do here.[9]

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lenges have been uniformly - and finally - rejected. The fairness of Grayson's trial is no longer open to question.

[8] Grayson's repeated invocation of this Court's decision in *House* (Pet. at 2, 12, 14) is puzzling; comparisons between this case and that are decidedly unfavorable to him. First, *House* provides a glimpse of how Grayson might have litigated his DNA-request claim; unlike Grayson, who bypassed all post-conviction opportunities to request testing in favor of filing an eleventh-hour §1983 complaint, House pursued his DNA-based claim on federal habeas. Second, House presented a far more compelling claim than Grayson has here. In *House*, this Court faced an exclusionary DNA test result *combined with* (1) what the Court called "disarray" surrounding the State's handling of forensic evidence, complete with spillage, contamination, and exposure, and (2) "troubling evidence" that an identifiable third party (namely, the victim's husband) might well, in fact, have been the killer. 126 S. Ct. at 2083. Even on that record, this Court called it a "close" question whether House had made out a "gateway" claim under *Schlup*, *id.* at 2086, and, more importantly, *unanimously rejected* House's freestanding actual-innocence claim under *Herrera*, *see id.* at 2086-87. Here, of course, all we have is a naked (and tardy) request for DNA testing by a duly-convicted individual who does not even assert his own innocence, let alone someone else's guilt. Assuming, therefore, that Grayson's current request is indeed a prelude to a freestanding *Herrera*-based innocence claim, *see supra* note 7, *House* conclusively demonstrates that the claim (which, even assuming a favorable test result, would be demonstrably weaker than House's own) is doomed to failure.

[9] Grayson's citation to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004), as evidence of the importance of "the role of the jury" (Pet. at 14) is doubly flawed. First, Grayson did not cite those cases or make any "role of the jury" argument in his briefs to the Eleventh Circuit. *See, e.g.*, Grayson C.A. Br. vi-vii (Table of Authorities). Second, none of those cases arises in the same procedural posture as Grayson's - namely, a convict's post-trial, post-appeal, post-post-conviction effort to *undo* a jury's verdict and, in effect, prove anew his actual innocence.

4. Grayson inexplicably waited until the eleventh hour to seek DNA testing. It is undisputed that Grayson waited 15 years - and until the proverbial eleventh hour - to seek DNA testing. Grayson has contended in his defense that "[a]t the time of [his] conviction" (in 1982) and the "appeal thereof" (1984-85), "DNA testing was not available, nor had the scientific process been developed." C.A. ER 1 Exh. F, p.1 (Grayson Aff.); *accord* Pet. at 26 (Grayson's "trial ended" "long before the advent of this revolutionary technology"). That may be so, but it is undeniable that by the time Grayson filed his first state post-conviction petition in 1986, DNA testing was being used in criminal cases. *See, e.g.*, U.S. Department of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 1, 26, 27 (Sept. 1999) (dating use of DNA testing in criminal cases to 1985 or 1986). Indeed, Grayson's own DNA expert was employing a relatively advanced form of DNA-testing technology as early as 1986, *see* C.A. ER Exh. D, p.2 (Blake Aff.), and the Innocence Project, which is currently handling Grayson's case and which is devoted exclusively to DNA-based litigation, was established in 1992, *see* Innocence Project, About the Innocence Project, http://www.innocenceproject.org/about/ (Nov. 28, 2006)

Beginning in 1986, Grayson had post-conviction petitions pending in the state or federal courts for the better part of 15 years. *See supra* at 3-4. Throughout those post-conviction proceedings - in both state and federal court - Grayson was represented by Stephen Bright, one of the "foremost experts in capital defense work in the country." *Williams v. Head*, 185 F.3d 1223, 1228 & n.2 (11th Cir. 1999) (emphasizing Bright's considerable expertise). Nonetheless, as the Eleventh Circuit emphasized, despite the ready availability of DNA testing technology and the expertness of his counsel, Grayson *never* sought testing during the 15 years that his post-conviction challenges percolated. App. 10a-11a. Instead, as chronicled above (*see supra* at 3-5), Grayson waited to seek testing until September 23, 2002. Not only did Grayson wait until after his post-conviction challenges had run their course, but also - and more tellingly - he waited until

after the State, sensing some finality, had formally requested an execution date from the Alabama Supreme Court. *To this day, Grayson has offered no explanation whatsoever for his delay.*

The only explanation that suggests itself – particularly given Grayson's continuing failure to proclaim unambiguously his actual innocence – is that Grayson viewed a last-minute DNA request as a way to postpone his execution. If that was the strategy, it worked perfectly. As we have explained (*see supra* at 5), the Alabama Supreme Court – at Grayson's urging and over the State's objection – has refused to set an execution date "pending a ruling" in Grayson's DNA-based §1983 suit.[10]

B. Even Setting Aside The Peculiarities Of Grayson's Case, The Eleventh Circuit's Reasoning Is Sound And Its Decision Correct.

In his §1983 complaint, Grayson forwarded six separate claims: (1) "violation of due process of law"; (2) "actual innocence"; (3) "cruel and unusual punishment"; (4) "confrontation and compulsory process"; (5) "right of access to courts and equal protection of the laws"; and (6) "clemency." C.A. ER 1, p.11. By the time his case reached the Eleventh Circuit, Grayson had abandoned many of his initial claims and was focusing on the "due process" and "clemency" angles. With respect to the former, Grayson argued that he had a due process right to testing under (1) *Brady v. Maryland* and its progeny; (2) *Matthews v. Eldridge*'s three-part balancing test; (3) *Arizona v. Youngblood*; and (4) substantive due process principles. Grayson C.A. Br. 18-50. With respect to the latter, Grayson contended that without DNA testing he could not "effectively pursu[e] executive clemency." *Id.* at 51-55.

In his current petition, Grayson has dropped much of the argumentation he presented to the Eleventh Circuit. He no longer seeks to rely on *Youngblood* (*see supra* at 10) or –at

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[10] On November 11, 2006, Grayson filed yet another §1983 action; the latest suit challenges the method by which Alabama administers lethal injection. *See Grayson v. Allen*, No. 2:06-cv-1032-MEF (M.D. Ala.).

least in so many words - substantive due process, nor does he persist in his clemency-based contention. In this Court, Grayson pursues only two theories to support his testing request: *Brady* (Pet. at 22-26) and *Matthews* (Pet. at 27-29). The Eleventh Circuit correctly rejected both.

1. Grayson Is Not Entitled To Testing Under *Brady v. Maryland*.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Grayson would have this Court extend *Brady* doctrine in two significant ways. Neither extension is warranted.

a. Brady *is a "fair trial" right.* In rejecting Grayson's argument, the Eleventh Circuit here emphasized (citing this Court's decisions for support) that a prosecutor's *Brady* obligations, as such, "do not extend beyond a defendant's conviction." Pet. at 22. To be clear, the question here is not whether a pre-trial failure to disclose evidence covered by *Brady* can be *remedied* in post-conviction proceedings. Of course it can. But Grayson has made no argument that the State violated *Brady* by refusing to turn over exculpatory evidence that it knew about (but that Grayson didn't) pre-trial. Rather, the question here is whether *Brady* can be read to obligate the State to disclose potentially favorable evidence that only *arises* post-conviction. It cannot - and, indeed, the only case that Grayson cites to support his proposed extension of *Brady* obligations beyond a defendant's conviction actually defeats his argument.

Brady is triggered, this Court has observed, by "the discovery, after trial, of information favorable to the accused that had been known [*i.e.*, before or during trial] to the prosecution but unknown to the defense." *United States v. Bagley*, 473 U.S. 667, 678 (1985); *accord United States v. Agurs*, 427 U.S. 97, 103 (1976) (same). Accordingly, time and again - beginning in *Brady* itself and continuing on up to the present - the Court has reiterated that the right established in

Brady is a "fair trial" right. *E.g.*, *Brady*, 373 U.S. at 87 ("avoidance of an unfair trial"); *Agurs*, 427 U.S. at 99 ("fair trial"); *Bagley*, 473 U.S. at 675 ("fair trial"); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ("fair trial"); *United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("fair trial"). Indeed, the Court has emphasized the "critical point" that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Agurs*, 427 U.S. at 108; *accord Bagley*, 473 U.S. at 678 (same).

This Court's consistent emphasis on *Brady*'s "fair trial" trappings – and on the absolute necessity of establishing a trial's unfairness as a prerequisite to a *Brady* claim – is significant here for two reasons. First, the case law underscores that *Brady* obligations apply to evidence known to the State (but not to the defense) before and during trial, not to what Grayson has called "after-acquired" evidence. Grayson C.A. Br. 20. Second, Grayson does not – and cannot in this §1983 action[11] – contend that his trial was unfair in the due-process sense, either as a result of a true *Brady* violation or of anything else.

In the face of this mass of authority confirming *Brady*'s status as a fair-trial right, Grayson cites (Pet. at 24) *Imbler v. Pachtman*, 424 U.S. 409 (1976) to support his proposed extension of *Brady* principles to the post-conviction setting. But far from supporting Grayson's contention, *Imbler* fatally undermines it. In the course of a discussion about prosecutorial immunity under §1983, the *Imbler* Court referred to a prosecutor's duty "to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation." *Id.* at 427 n.25. In the key sentence, the Court then stated that "*[a]t trial*, this duty is enforced by the requirements of *due process*," while "*after a conviction* the prosecutor also is bound by the *ethics of his office* to inform the appropriate authority of after-acquired or other informa-

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[11] *See supra* note 3 (discussing *Heck v. Humphrey*, 512 U.S. 477).

tion that casts doubt upon the correctness of the conviction." *Id.* (emphasis added). The message is clear: Post-conviction disclosures are governed *not* by "the requirements of due process" as articulated in *Brady* and its progeny but, rather, by non-constitutional ethical standards.

The State, of course, does not take its ethical obligations lightly. But Grayson brought suit under §1983, which by its own terms applies only to "deprivation[s] of any rights, privileges, or immunities secured *by the Constitution and laws*" of the United States. 42 U.S.C. §1983 (emphasis added). Section 1983 is a vehicle for the enforcement of distinctly federal rights, not local bar standards. *See, e.g., Knight v. Jacobson*, 300 F.3d 1272, 1276 (11th Cir. 2002) ("Section 1983 does not create a remedy for every wrong committed under the color of state law, but only for those that deprive a plaintiff of a federal right.").[12] Grayson has cited absolutely no support in this Court's jurisprudence for the proposition that *Brady*'s *constitutional* rule – *i.e.*, the disclosure obligation itself – extends beyond a defendant's conviction.

Grayson is left to rely on a few "federal district court decisions" suggesting *Brady* as a source for a right to post-conviction DNA testing. Pet. at 22-26. But Grayson's citations only underscore the fact that every *appellate court* to address the question presented here has expressly rejected the suggestion that there is a federal constitutional right –

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[12] It is not at all clear, in any event, that the applicable rules of professional conduct would require a prosecutor to consent to the DNA testing that Grayson seeks. Neither Rule 3.8 of the Alabama Rules of Professional Conduct, *see* http://alabar.org/ogc/ropc/rule3-8.htm (Nov. 28, 2006), nor the ABA's *Standards of Criminal Justice Relating to the Prosecution Function*, *see* http://www.abanet.org/crimjust/standards/pfunc_blk.html (Nov. 28, 2006), requires – either expressly or by clear implication – post-conviction disclosure of potentially useful evidence. Notably, the latter clearly locates the prosecutor's disclosure obligations in the section titled "Investigation for Prosecution Decision." *See id.* §3-3.11. In any event, the point is that while the State could seek a bar opinion concerning post-conviction DNA testing, no answer it received, however definitive, could ever support a §1983 action to compel that testing.

under *Brady* or elsewhere - to post-conviction testing. Until some federal appellate court or state supreme court agrees with Grayson, there is no basis for certiorari.

b. Brady *applies to evidence that is actually, not just potentially, favorable.* Grayson's theory here requires a second fundamental extension of *Brady* doctrine to include evidence that may - but may not - prove favorable or exculpatory. *See, e.g.*, Pet. at i, 8, 10, 11, 20, 27, 28 ("potentially exculpatory biological evidence"). There is no support for that extension. By its own terms, Brady applies only to "evidence favorable to an accused" - not *potentially* favorable, but *actually* favorable. 373 U.S. at 87. Judge King put the point simply in *Harvey v. Horan*:

> [U]nder the second prong of the *Brady* rule, the prosecution is only required to disclose evidence that is favorable to the defendant. *Brady*, 373 U.S. at 87, 83 S. Ct. 1194. It is not now known whether the biological evidence being sought by Harvey would be favorable or unfavorable to him. As such, even if Harvey had been denied access to the evidence during his trial, the *Brady* rule would not have applied.

278 F.3d at 385 n.6 (King, J., concurring).

This Court has repeatedly and unambiguously confirmed that *Brady* embodies an *actual*-favorableness requirement. *See, e.g., Agurs*, 427 U.S. at 99, 106, 107, 111 (evidence must be "exculpatory"); *Bagley*, 473 U.S. at 674, 675, 678, 680, 682 (evidence must be "favorable to the accused"); *id.* at 676 ("exculpatory"); *Kyles*, 514 U.S. at 421, 432, 433, 435, 437, 438, 439, 451, 453 ("favorable"); *id.* at 433 ("exculpatory"). Further, this Court's decisions make clear that the "potentiality" gloss that Grayson seeks to graft onto *Brady*'s favorableness requirement (such that *Brady* would be triggered by "potentially favorable" evidence) applies instead to *Brady*'s separate materiality requirement: "[T]he constitutional duty [to disclose] is triggered by the potential impact of favorable but undisclosed evidence." *Kyles*, 514 U.S. at 434. That is, *Brady* "requires disclosure only of evidence that

is both favorable to the accused and 'material to either guilt or punishment'" - where "material" means that there is a "reasonable probability" that, had the evidence been disclosed, "the result of the proceeding would have been different." *Bagley*, 473 U.S. at 674, 682. In other words, *Brady* evidence must be (1) *actually* favorable and, in addition, (2) "reasonabl[y] probabl[y]" - *i.e.*, *potentially* - outcome determinative. A request for DNA testing, the result of which is of course unknown, does not qualify.

2. Grayson Is Not Entitled To Testing Under *Matthews v. Eldridge*.

Grayson also asserts that he has a procedural due process right to testing and that the Eleventh Circuit's three-part *Matthews v. Eldridge* analysis was "incorrect." Pet. at 27. He asks, in effect, for this Court to engage in a fact-intensive rebalancing of the scales. There is, with respect, nothing certworthy about Grayson's *Matthews* argument.

The only one of this Court's procedural-due-process cases that involves an individual in Grayson's shoes - a duly convicted and death-sentenced inmate - is *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). In that case, a condemned prisoner who had exhausted his appeals filed a §1983 action challenging the procedures employed in connection with his state clemency investigation; he contended, for instance, that he had received insufficient notice of his clemency hearing and that his lawyer had been improperly excluded from participation in the process.

Four justices in *Woodard* concluded that a duly convicted and death-sentenced inmate has no continuing "life interest" that could support a procedural-due-process challenge to clemency procedures. *See id.* at 279-82 (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ.). Four concurring justices believed, however, that "[a] prisoner under a death sentence remains a living person and consequently has an interest in his life," *id.* at 288 (O'Connor, J., joined by Souter, Ginsburg, and Breyer, JJ., concurring in the judgment), and Justice Stevens, who dissented, added a fifth vote

for the latter view, *see id.* at 291 (Stevens, J., dissenting in part). Critically, however, the concurring justices concluded that a condemned inmate's continuing life interest, though existent, was so attenuated as to trigger only the most "*minimal* procedural safeguards." *Id.* at 289 (emphasis in original). Indeed, they ventured only that "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency ...." *Id.*

Accordingly, even assuming - as the Eleventh Circuit here did (App. 24a) - that procedural-due-process principles apply to Grayson's claim, unless the State's decision not to conduct DNA testing here is tantamount to a coin-flip, his argument must fail. Plainly, the State's actions here are not arbitrary or irrational in the coin-flip sense, as a review of the second and third *Matthews* factors indicates. With respect to the second factor, the Eleventh Circuit was correct to conclude, particularly given the specifics of Grayson's case, that "the risk of an erroneous deprivation of Grayson's alleged liberty interest is low, and the probable value of Grayson's post-conviction access to evidence is slight." App. 25a. In his petition, Grayson studiously ignores the circumstances of his own case in favor of a reliance on 187 *other* individuals whom, he says, were exonerated by DNA testing. Pet. at 16-19, 28. Grayson's attempt to focus the Court's attention elsewhere is understandable. Recall that Grayson himself (1) repeatedly confessed to killing Mrs. Orr, both to the police and again in open court; (2) to this day has never recanted those confessions or so much as asserted his actual innocence; (3) faces overwhelming evidence of guilt; (4) requests testing that, even if favorable, cannot definitively prove his innocence; and (5) inexplicably never, during the 15 years his case was pending in post-conviction proceedings, sought the testing he now seeks at the eleventh hour. *See supra* at 12-21. Grayson's claim here, in essence, is that *every* condemned inmate, no matter how flimsy his case, has an "absolute" procedural-due-process right to post-

conviction DNA testing. Pet. at 28. That is not, and should not be, the law.

With respect to the third *Matthews* factor, the Eleventh Circuit correctly held that the State has a keen interest in preventing a flood of post-conviction DNA-testing requests - or requests for re-examination based on whatever other kind of technology may evolve down the road - and in protecting the finality of duly-adjudicated criminal convictions and sentences. Grayson asserts that the floodgates problem isn't real, and cites as support his assertion that since the Eleventh Circuit "held that cases like this one could proceed under §1983," there "has been no flood of §1983 plaintiffs pressing similar claims." Pet. at 29. But that argument misses the point. Holding, on the one hand, that a legal claim may be pursued and, on the other, that the claim has substantive merit are two entirely different things. Were a court to give credence to Grayson's novel due-process theory requiring post-conviction DNA testing, there can be little doubt that the requests would rush in.

The State's interest in finality, of course, is undeniable. *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 555 (1998); *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Murray v. Carrier*, 477 U.S. 478, 487 (1986). Grayson has contended in this litigation that post-conviction DNA testing does not "trespass[] on any interests that support the finality of judgments" and, more particularly, that "*[t]esting has no impact whatsoever on victims, witnesses or complainants, unless it actually exonerates an innocent individual.*" Grayson C.A. Br. 36-37 (Grayson's emphasis). Grayson's position in that respect is, frankly, so detached from reality as to be unbelievable. "Finality" is not some free-floating, abstract ideal. It serves fundamental public policies, not the least of which, as this Court has emphasized, is ensuring that crime victims and their survivors get the closure and sense of repose to which they are entitled. *See Calderon*, 523 U.S. at 556 ("Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out.").

Given these weighty concerns, it is hardly arbitrary or irrational for the State to decline at this late date to reopen Grayson's case for the purpose of DNA testing - particularly given, again, that Grayson to this day has never asserted his actual innocence, that the record evidence of his guilt is overwhelming, that the testing sought could not definitively prove his innocence, in any event, and that he inexplicably waited until the eleventh hour to seek testing.

III. This Court Should Deny Certiorari Because Post-Conviction DNA Testing Is An Issue Uniquely Suited To Legislative Resolution.

Given the difficulties inherent in defining and administering a "right" to post-conviction DNA testing - Who could assert the right? Must a petitioner have steadfastly maintained his innocence? What sort of threshold showing is required? What sort of relief should follow a favorable result? - this is an issue that is uniquely suited to *legislative* resolution. As this Court has emphasized, it is often "easier to devise a [right] by statute than to derive [it] through the Constitution, simply because the statute can let the [right's operation] turn on any sort of practical consideration without having to subsume it under a broader principle." *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001). And, of course, as Judge Wilkinson has stressed, post-conviction DNA testing "is not an area in which legislative bodies have gone into permanent recess." *Harvey v. Horan*, 285 F.3d 298, 301-02 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing en banc). Quite the contrary, legislatures around the country are presently grappling with this very issue, and, as Grayson himself observes in his petition, "the overwhelming majority of states have passed statutory mechanisms to allow convicted defendants to seek such testing." Pet. at 20.

Grayson's assertion that Alabama, specifically, "has tragically failed" to address the issue of DNA testing legislatively (Pet. at 20) is both irrelevant and misleading. It is irrelevant because the federal courts do not exist simply to

supply outcomes that the democratic process rejects. And it is misleading because it suggests that the Alabama Legislature has finally and definitively refused to create a statutory right to DNA testing. That is incorrect; the situation in Alabama is more fluid than Grayson is willing to admit. A bill that would provide for post-conviction testing in certain circumstances, Senate Bill No. 28, was unanimously voted out of committee in February 2006. The bill, however, was not put to a floor vote during the legislative session and is presently listed as having been "indefinitely postponed." Alabama Legislative Information System Online, Bill Status for SB28, http://alisdb.legislature.state.al.us.acas/ACASLogin/asp (Nov. 28, 2006).[13] So, to be sure, Alabama has not yet created a statutory mechanism for obtaining post-conviction DNA testing. The point, though, is that the democratic dialogue concerning that very issue is ongoing.

Grayson apparently believes that the current legislative ferment provides a reason for this Court's intervention. But just the opposite is true. "[T]he States are currently engaged in serious, thoughtful examinations" of the post-conviction DNA testing issue. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). This Court should not "short-circuit legislative activity," *Harvey*, 278 F.3d at 376-77, through "the conversation-stopping process of constitutionalization," *Harvey*, 285 F.3d at 301 (Wilkinson, C.J.). Put simply, democracy appears to be working, and the Court should let it work.

CONCLUSION

For the foregoing reasons, the Court should deny Grayson's petition for certiorari.

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[13] Grayson would not qualify under SB 28. As drafted, the bill requires, as prerequisites to relief, (1) "[a]n assertion of actual innocence of the offense for which an applicant was convicted, under penalty of perjury"; and (2) "[p]rima facie evidence demonstrating that the identity of the perpetrator was at issue in the trial that resulted in the conviction of the applicant." SB 28, p.3. Neither condition is satisfied here.

Respectfully submitted,

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